IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: October 25, 2007
Date of Decision: November 5, 2007

CHAT.A.REF. 2 of 2003 & CMs 3818/2004, 5503/2005

THE COUNCIL OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA ..... Petitioner.
Through Mr. K.K.Jain with Mr. Rakesh Aggarwal, Advocates.

Versus

LOKESH DHAWAN F.C.A. ..... Respondent
Through Mr. U.Hazarika with Mr. S.S.Chaudhary, Advocates.

CORAM:
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the order? Yes
2. To be referred to the reporter or not? Yes
3. Whether the order should be reported in the Digest? Yes

DR. S. MURALIDHAR,J.

1. This is a reference by the Council of The Institute of Chartered Accountants of India ('Council of the ICAI') under Section 21(5) of the Chartered Accountants India Act, 1949 ('Act') with a recommendation that the name of Respondent No.1 herein, who has been held to be guilty of 'other misconduct' in terms of the Act, should be removed from the Register of Members for a period of three months.

Background Facts

2. The facts leading to this reference are that the Respondent No.1 is a partner of a firm of Chartered Accountants by the name of Dhawan & Gulati ('D&G') who were appointed as statutory auditors for the State Bank of Hyderabad by a letter dated 9th March, 1996. Enclosed to the letter of

appointment was a copy of the Reserve Bank of India ('RBI') guidelines regarding the eligibility of the auditors to audit fees, lodging and travelling allowances.

3. After their appointment as statutory auditors, D&G drew an advance of Rs.1,50,000/- from the SBH towards expenses. Of this a sum of Rs.70,450/- was spent and the balance Rs.79,550/- remained with the firm. This was later adjusted by the SBH against the audit fees payable to D&G. Upon completion of the audit, D&G forwarded to the SBH the statement of expenses and accounts along with copies of bills. According to D&G, the SBH was liable to pay it a sum of Rs.29,145/- after adjusting advances.

4. The SBH in turn wrote a letter on 12th September, 2006 to D&G calling upon it to pay, after making adjustments, a sum of Rs.90,666.55 being the amount spent by D&G expenses towards lodging and boarding in excess of the permissible limits stipulated by the RBI in its guidelines. This was contested by the D&G and a series of correspondence ensued. By a letter dated 11th February, 1997, the SBH informed D&G that "an amount of Rs.70,808.64 is due from you to the Bank after accounting for all admissible expenses according to the directives of RBI." D&G was called upon to refund the said amount "immediately and settle the matter without further delay." However by its letter dated 11th March, 1997, the D&G declined to accede to this demand and reiterated that "since bank had made all arrangements for due boarding and lodging and no specific request had been made from our side the bank had to bear the extra expenses incurred."

5. On 1st August, 1997 a complaint was lodged by the SBH with the

ICAI against D&G in which it was contended, inter alia, that the firm was guilty of misconduct on three counts. The first was that D&G had not repaid the sum of Rs.70,808.64 being the excess amount of advance availed for conducting a statutory audit. Second, the firm canvassed for procuring from SBH computer business for their sister concern. Third, the firm utilised the service of one Shri Chabbra, Chartered Accountant who was neither a partner nor an employee of the firm. A copy of the complaint was then sent by the ICAI to D&G on 11th December, 1997 for its comments.

6. After receiving the complaint, D&G repaid to the SBH the sum of Rs.70,808.64 by demand draft on 18th December, 1997. On 29th December 1997, D&G replied to the SBH pointing out that they had already refunded the said sum "to the bank for the excess money spent on our boarding and lodging during the audit period vide bank draft No.025623 dated. 18th December 1997." D&G further stated: "We have always been keen to settle this issue and has been in constant touch with the Finance and Accounts departments for details and clarifications but perhaps due to the lack of a personal meeting between us and the bank officials, the matter dragged on for such a long time." In the last paragraph of this letter, D&G stated as under:

> "We do hope we have clarified our position with regard to the issues raised in the complaint satisfactorily and still are willing to provide any other clarification that you may so desire. In light of our submissions above we hope your office shall be kind enough to withdraw the complaints filed with the Institute of Chartered Accountants as well as the Reserve Bank of India."

This letter was signed by Respondent No.1 on behalf of D&G.

7. The SBH, by its letter of the same date addressed to D&G, forwarded the TDS certificate in the sum of Rs.5,721/- on account of the tax deducted at source towards settlement of balance amount of audit fee (Rs.1,14,416/-) for the year 1995-96.

8. By their letter dated 10th February 1998, D&G informed the ICAI that the Respondent No.1 herein, a partner of the firm, would be answerable to the charge of misconduct against D&G. Consequently, Respondent No.1 submitted his written statement duly verified on 21st February, 1998 to the ICAI. The comments in reply to the complainant's rejoinder were submitted by Respondent No.1 on 11th June, 1998. After the pleadings were completed the Council of the ICAI formed a prima facie opinion that the Respondent No.1 was guilty of professional and/or other misconduct and a reference was made by it to the Disciplinary Committee ('DC') for the further steps.

9. The recording of evidence before the DC took place on 8th July, 1999. Before the DC, the following three charges were read out to Respondent No.1:

> "1. The Respondent demanded and received large sums of money towards advance payment and claimed expenses beyond the eligibility/entitlement as per RBI guidelines and failed to refund the unspent amount.
>
> 2. The Respondent canvassed for procuring computer business for his sister concern from the client-bank by using his position as its statutory central auditor.
>
> 3. The Respondent hired the services of Shri Chabbra, Chartered Accountant, who was neither his partner nor employee, to do the work."

10. Before the DC, as regards charge No.1, the Respondent No.1 herein pleaded guilty. By its report dated 17th January, 2000, the DC formed the opinion that "the Respondent is guilty of having made excess claim towards TA/DA and other expenses and retaining the outstanding balance with him for nearly 21 months. In the opinion of the Committee, this charge would squarely fall under 'other misconduct' as defined in the Code of Conduct." The Respondent No.1 was, however, exonerated of charge Nos. 2 and 3. Therefore, the present proceedings are confined to examining the correctness of the report of the DC and the findings and recommendations of the Council of the ICAI as regards charge No.1.

11. After the response of the D&G to the report of the DC was obtained, the matter was considered by the Council of the ICAI. By its resolution dated 26th March 2001, the Council recommended the punishment of removal of the name of Respondent No.1 from the Register of Members for a period of three months. This was communicated to Respondent No.1 on 28th September, 2001. The present reference was thereafter made to this Court.

Submissions of Counsel

12. Mr.K.K.Jain learned counsel for the petitioner took us through the record and submitted that the recommendation of the Council for the ICAI should be accepted. In response, Mr. Upamanyu Hazarika, learned Advocate appearing for Respondent No.1 submitted as under:

(a) The scope of the jurisdiction of this Court under Section 21(5) read with Section 21(6) of the Act is wide enough to set aside the report of

the DC and dismiss the complaint if it found that the complaint was wholly unsubstantiated.

(b)Notwithstanding the fact that the record of the proceedings of the DC showed that the Respondent No.1 pleaded guilty to charge No.1, that recording was erroneous. A review petition had been filed by Respondent No.1 before the Council which came to be rejected on the ground that the Council lacked the power to review its own order. It was urged that the Respondent No.1 never really intended to plead guilty to charge No.1. It is claimed that it was only in response to a suggestion of a Member of the DC whether the amount refunded by D&G to the SBH was under dispute/protest that Respondent No.1 admitted to not having followed the manner suggested and stated that "I plead guilty. It has been paid without protest." It is claimed that this was the limited extent of admission of guilt and that Respondent No.1 never intended to plead guilty of charge No.1.

(c) There was no individual misconduct by the Respondent No.1 since he was acting on behalf of the firm D&G. The complaint was also against the firm. Therefore the Respondent No.1 alone cannot be held responsible for the acts of the firm.

(d) The complaint itself was motivated since it was by way of reprisal against certain observations made by the D&G regarding the nature of the security accepted against a loan/advance made by SBH to M/s. Noble Tele Systems and that a major part of the security to the extent of Rs.53 crores was calculated on the basis of software packages not approved for valuation by RBI guidelines.

(e) Finally it is stated that the recommendation of the Council had been circulated to every one even prior to its communication to

Respondent No.1 and this had damaged the reputation of Respondent No.1 irreparably.

Whether the plea of guilt was correctly recorded?

13. The jurisdiction of this Court in the present proceedings as explained by the Supreme Court in ***Institute of Chartered Accountants v. B. Mukherjea AIR 1958 SC 72*** is indeed wide enough to include the quashing of the findings of the DC and the Council and consequently the complaint itself. However, as far as the present case is concerned, the facts themselves are not in dispute. After the plea of guilt by the Respondent No.1 in relation to charge No.1, it was unnecessary for the Council to return any finding on merits in that regard. If indeed the plea has been correctly recorded, it would be unnecessary for this Court to re-examine the issue on merits.

14. For considering the plea of the Respondent No.1 that the proceedings before the DC, attributing statements to him admitting to the guilt of Charge No.1, were not correctly drawn up it is necessary to examine the relevant portions of the full transcript of the proceedings before the DC which read as under:

> "President: Mr. Dhawan, kindly go through Regulation 15(2). It says, if the Respondent pleads guilty, the Disciplinary Committee shall record the plea and submit its report to the Council. Do you plead guilty or not?
>
> Respondent (Mr. Lokesh Dhawan): No Sir.
>
> President: When did you paid? (*sic*)
>
> Respondent (Mr. Lokesh Dhawan): 1st January, 1998.

President: Audit was in 1996?

Respondent (Mr. Lokesh Dhawan): Yes Sir but we were in the correspondence with them till April, 1997. We were not given an opportunity to sit across the table for setting the matter. There were lot of discrepancies in their statements which we wanted to clarify.

President: So, excess advance Rs.70,000/- was wrong. How much you have paid them on settlement?

Respondent (Mr. Lokesh Dhawan): Rs. 70,000.

President: Then, how do you say that there was a discrepancy?

Respondent (Mr. Lokesh Dhawan): They were claiming Rs.99,000/-.

President: This amount was not disputed?

Respondent (Mr. Lokesh Dhawan): We also disputed this amount.

President: So, still you have paid this amount?

Respondent (Mr. Lokesh Dhawan): Yes Sir, because, it is the dignity of our profession.

Shri Amarjit Chopra: Once you have re-paid. I do not know what is the covering letter which has been attached therewith. Whether it was said, the amount was paid under dispute. The claim of the bank was wrong, still you have paid for the dignity but if there is no dispute and there is no protest and there is no correspondence subsequent thereto for claiming the refund in respect thereof. Then, I think the position stands clear.

Complainant (Mr. Deshpande): For your benefit, I will read out the covering letter of the Respondent. It says, we are enclosing the demand draft for Rs.70,808.64 payable at Hyderabad towards outstanding balance. Kindly acknowledge the receipt.

Respondent (Mr.Lokesh Dhawan): Can I say something. The hotel bill in Bombay, where the four partners have stayed in two rooms. They are refusing to our two persons. That hotel bill, if you take four partners that comes within the limit. There is no excess amount.

President: Please go charge by charge?

Respondent (Mr. Lokesh Dhawan): I plead guilty, it has been paid without protest. I plead guilty to charge no.1. Charge no.2 and 3, I am not pleading guilty."

15. Further, the transcript of the record of proceedings before the DC shows that in the final submission made in regard to Charge No.1, the submission on behalf of Respondent No.1 was as under:

"In so far as charge no.1 is concerned, we have said **we have admitted today to the guilt that Rs.70,000, we have refunded was an amount which was found in excess with us**. That amount, we have refunded. I would only add that it is the mistake which has been committed Sir and it is felt from you Sir that it should not have been done, the manner in which it has been done that the advance was taken or anything was adjusted. **That we apologise for such behavior. It will not happen in future Sir. We would expect leniency on your part in your report. We sincerely apologise for this**." (emphasis supplied)

16. Despite the contention of Respondent No.1 that his pleas have not

been correctly recorded, upon examining the above transcript forming part of the record we are unable to come to the conclusion that the statements have either been incorrectly recorded or are untrue. Initially, the Respondent No.1 seems to have simply said "No Sir" to the question whether he was pleading guilty to the charges. However, later on, during the course of the same examination, the Respondent No.1 unambiguously stated as under:

> "I plead guilty, it has been paid without protest. I plead guilty to charge no.1. Charge no.2 and 3, I am not pleading guilty."

17. It is therefore not as if the Respondent No.1 was unaware, as he claims to be, that he was pleading guilty to charge No.1 and that he pleaded guilty only to the statement that he refunded the excess amount without protest. The record speaks for itself and there can be no manner of doubt that in order to buy peace, the Respondent No.1 in fact pleaded guilty to charge No.1. This Court finds that no case has been made out by the Petitioner to enable it to come to a conclusion that the statements made by him were incorrectly recorded by the DC. He also seems to have been fully conscious of the consequences thereof. Once the Respondent No.1 had pleaded guilty, further investigation of the charge by the DC was unnecessary.

18. At this stage we may mention that the Review petition was rightly dismissed by the Council since it had no power under the Act to entertain such a petition. On a perusal of the Review Petition this Court finds that the Respondent No.1 did not plead therein that that the statements attributed to him or his counsel in the course of the proceedings before the DC were incorrectly recorded. He also does not appear to have retracted those

statements. He only attempted to place a different interpretation on them. This Court is of the considered view that the statements that were recorded, as extracted above, cannot admit of two interpretations. Far from pleading innocence, Respondent No.1 in fact pleaded guilty and followed this up with a repeated apology. The submission of Respondent No.1 that his plea of guilt in regard to Charge No.1 was either incorrectly recorded or interpreted by the DC and the Council of the ICAI respectively is accordingly rejected.

Is Respondent No.1 guilty of 'other misconduct'?

19. An attempt was made to show that it is only for an act of professional and other misconduct that an enquiry under the Act is contemplated and that in the instant case since the claim of excess advance was made in the course of official duty, it cannot be said to be 'other misconduct'. In other words, it is submitted that even if the plea of guilt were held to be correctly recorded, the acts complained of do not constitute 'other misconduct' within the meaning of the Act.

20. This Court is unable to agree with this contention that the claim of excess advance contrary to the RBI guidelines was in the course of official work and therefore could not be brought under 'other misconduct'. Given the fact that there is no definition of 'other misconduct' in the Act, those words must be construed as admitting of a wide interpretation encompassing acts falling outside the definition of 'professional misconduct' under Section 22 of the Act. In the circumstances, the Court is of the view that the decision as to what constitutes 'other misconduct' by a member should be best left to the Council of the ICAI which is the disciplinary body comprised of peers, that is chartered accountants with several years of experience. The Council

of the ICAI is best equipped to arrive at such a decision keeping in view the need to maintain the highest standards of professional rectitude. It is in that expectation that the Parliament has vested the Council of the ICAI with the power of making such a determination. The High Court should not lightly substitute its view for that of the Council of the ICAI as to what constitutes 'other misconduct'. A person aggrieved by such determination and seeking judicial review and consequent reversal by the High Court would have to show either that it is procedurally flawed, or that on merits it is vitiated by perversity or malafides.

21. As far as the present case is concerned, the Respondent No.1 has been unable to demonstrate that the impugned decision of the Council of the ICAI that he is guilty of 'other misconduct' or its recommendation as to the punishment is either procedurally flawed or that on merits it is perverse or malafide. The view taken by the Council of the ICAI that the attempt by D&G represented by the Respondent No.1 at claiming excess beyond entitlement attracts the charge of other misconduct in terms of the Act suffers from no infirmity warranting interference by this Court.

22. The decision of the Bombay High Court in ***Institute of Chartered Accountants of India v. H.S.Ghia*** is not helpful to Respondent No.1 since the said case seems to have turned on its own facts. In that case, no evidence was led on behalf of the complainant to prove the case against the Respondent. It was in those circumstances that the disciplinary proceedings were quashed by the Bombay High Court. As far as the present case is concerned, this Court is of the view that there is no infirmity in the decision of the Council of the ICAI to the effect that claiming extra expenses and

advances beyond the entitlement stipulated by the RBI guidelines is sufficient to attract the charge of other misconduct against the Respondent No.1. The rationale for the decision is obviously this: that members of the ICAI are expected to display an exemplary conduct in their dealings with clients and act in a thoroughly professional manner in all their work-related actions. The plea that the acts with which D&G represented by Respondent No.1 have been charged do not constitute 'other misconduct' is hereby rejected.

Individual vs. Collective liability

23. As regards the question of the individual liability of Respondent No.1, there is no merit in the contention that it is the firm that should be held answerable. Having answered the charge against the firm, after being authorized in that behalf by the firm, it is not open to Respondent No.1 at this point in time to disown liability even if it was in the capacity of a partner of the firm D&G. The entire correspondence with the ICAI at all times and the pleadings before the ICAI were signed by Respondent No.1 and it is he who participated in the enquiry and made the pleas as already noticed. At the time when D&G wrote to the ICAI informing it that it is Respondent No.1 who would be answerable for the charges, no objection was raised by Respondent No.1. In fact he participated in the enquiry without demur. At no stage of the entire enquiry was such an objection raised. This plea of disowning individual liability after the conclusion of the enquiry can only be viewed as an abuse of process aimed at frustrating the entire exercise. Accordingly the objection raised on the ground that the case is one of collective responsibility of the entire firm is without merit and is rejected as such.

Other pleas

24. There is also nothing to show that the complaint against Respondent No.1 was brought about for collateral reasons in order to satisfy the SBH. No convincing material has been brought forth to substantiate such a wild allegation.

25. Learned counsel for the Respondent No.1 also took objection to the fact that the decision of the Council dated 28th September, 2001 was already disseminated to others before being communicated to the Respondent No.1. We have gone through the records and find no force in this contention. In any event this does not impinge on the validity of the order passed by the Council.

26. For all of the above reasons we confirm the findings of the DC and the Council of the ICAI that Respondent No.1 is guilty of "other misconduct' and accept the recommendation made by the Council of the ICAI that the name of Respondent No.1 be removed from the Register of Members for a period of three months. Further steps will now be taken in accordance with the law. The reference and all the pending applications stand disposed of.

S. MURALIDHAR, J

MADAN B. LOKUR, J

November 5, 2007
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